Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1993

CENTRAL DISTRIBUTORS OF BEER, INC.,

Petitioner,

v.

DONALD CONN, GLORIA CONN, JOHN NATE BEVERAGE, INC., AND JOHN NATE, JR.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Dated: April 25, 1994

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44pp

QUESTIONS PRESENTED

I. TO VIOLATE THE WIRE FRAUD OR MAIL FRAUD STATUTES, MUST A FRAUDULENT MISREPRESENTATION BE MADE DIRECTLY BY THE DEFENDANT TO THE PERSON DEFRAUDED, EVEN WHEN INTERSTATE TELEPHONE CALLS WERE MADE BY THE DEFENDANT TO A THIRD PARTY IN FURTHERANCE OF THE SCHEME TO DEFRAUD?

Petitioner answers "No."

The Sixth Circuit answered "Yes."

Seven other Circuit Courts have addressed this issue. Four Circuits (the First, Eighth, Ninth and Tenth Circuits) answered "No". Two Circuits (the First and Fourth Circuits) answered "Yes". The Second Circuit is split on this issue.

II. DO THE ELEMENTS OF WIRE FRAUD OR MAIL FRAUD DIFFER DEPENDING UPON WHETHER THE CASE IS (A) A CRIMINAL PROSECUTION OR (B) A CIVIL CASE UNDER THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT ("RICO"), 18 U.S.C. § 1961 *ET SEQ.*, IN WHICH WIRE FRAUD OR MAIL FRAUD IS ALLEGED AS A PREDICATE OFFENSE?

Petitioner answers "No".

The Sixth Circuit effectively answered "Yes", in conflict with this Court's decision is *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 87 L.Ed.2d 346, 105 S. Ct. 3275 (1985).

LIST OF PARTIES AND CORPORATE AFFILIATES

In the proceedings below, Plaintiff was Central Distributors of Beer, Inc., a Michigan corporation. Defendants were Donald Conn, an individual, Gloria Conn, an individual, John Nate Beverage, Inc., a Michigan corporation (now known as Bud Distributing, Inc.), and John Nate, Jr., an individual, jointly and severally. They are all also parties to the proceeding in this Court, and there are no additional parties.

Central Distributors of Beer, Inc. is a privately-held corporation with no subsidiaries that are not wholly owned.

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DONALD CONN, GLORIA CONN,
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Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Central Distributors of Beer, Inc., respectfully petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (including the dissenting opinion of Senior Circuit Judge Wellford) is reported at 5 F.3d 181, and is reprinted as Appendix A at pages A1 through A12.

(References to the appendices bound with this Petition are styled "A___"). The January 25, 1994 Court of Appeals' Order denying Plaintiff's Petition for Rehearing and/or Reconsideration is reprinted as Appendix B, at page A13.

The Amended Order of the United States District Court for the Eastern District of Michigan, Southern Division (LaPlata, D.J.) granting Defendants' Motion for Summary Judgment has not been reported. The District Court's ruling is reprinted as Appendix C, at pages A14 through A18.

JURISDICTION

The decision of the Court of Appeals was announced on September 23, 1993. Petitioner's Petition for Rehearing and/or Reconsideration was denied in an Order entered by the Court of Appeals on January 25, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the intended purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal

> Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both.

18 U.S.C. § 1343:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . transmits or causes to be transmitted by means of wire . . . communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both . . .

18 U.S.C. § 1961(1):

> "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . .

18 U.S.C. § 1962(c):

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . .

STATEMENT OF THE CASE

This is a claim brought by Petitioner, Central Distributors of Beer, Inc. ("Central Distributors"), pursuant to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), specifically 18 U.S.C. § 1962(c). Central Distributors has also asserted several state law claims.

Respondents Donald Conn, Gloria Conn and John Nate, Jr., through the enterprise of John Nate Beverage, Inc. ("Nate Beverage"), engaged in a pattern of racketeering activity involving wire fraud, mail fraud, "bootlegging" of beer and other crimes over a period of approximately six (6) years. Central Distributors was the victim of Respondents' racketeering activities.

Under the Michigan Liquor Control Act, MCLA § 436.1 *et seq.*, sellers of alcoholic beverages must be licensed by the State of Michigan. A licensed wholesaler may sell only to licensed retailers, and only licensed retailers may sell to individual consumers. Furthermore, each beer wholesaler has an exclusive territory. The boundaries of the territory are determined by contract between the wholesaler and the brewer. Within the wholesalers' exclusive territory, no other wholesaler may sell the brands of beer covered by the wholesaler-brewer contract. Sales outside a wholesalers' territory are both a breach of contract and a violation of the Michigan Liquor Control Act.

Central Distributors is a licensed wholesaler of various brands of beer brewed by Anheuser-Busch, Inc. ("Anheuser-Busch"), such as Budweiser, Bud Light and Michelob. Pursuant to the Michigan Liquor Control Act

and Central Distributors' Wholesaler Equity Agreement with Anheuser-Busch, Central Distributors has an exclusive geographic territory in which no other wholesaler may sell Anheuser-Busch beer to retailers. Central Distributors' exclusive territory includes most of Wayne County, Michigan (except the City of Detroit and the Grosse Pointes) plus a small portion of Oakland County, Michigan.

Respondent Nate Beverage is another Anheuser-Busch distributor located in Dowagiac, Michigan. Nate Beverage's exclusive territory is located approximately 150 miles away from Central Distributors' exclusive territory.

Respondents conspired to defraud Central Distributors by selling beer within Central Distributors' exclusive territory in violation of the Wholesaler Equity Agreement and the Michigan Liquor Control Act. These illegal sales damaged Central Distributors because only Central Distributors had the right to sell Anheuser-Busch beer to retailers within its exclusive territory.

Respondents' scheme to defraud Central Distributors involved wire fraud and mail fraud. Respondents used interstate telephone calls and mail to the Anheuser-Busch brewery in Columbus, Ohio to order the beer which was illegally sold in Central Distributors' exclusive territory. Interstate communications were necessary, because there is no Anheuser-Busch brewery located in the State of Michigan. Respondents obtained the beer under false pretenses by deceiving Anheuser-Busch into believing that the beer would be sold legally to retailers in Nate Beverage's exclusive territory. This deception was a necessary

part of Respondents' scheme to defraud Central Distributors, because Anheuser-Busch only sells beer to authorized wholesalers for sale within their own territories. Without these interstate telephone calls and letters, Respondents could not have obtained the Anheuser-Busch beer that was illegally sold in Central Distributors' exclusive territory. In addition, false weekly reports were submitted by Respondents to Anheuser-Busch about Nate Beverage's retail sales and inventory levels, in order to hide the illegal sales.

Respondents' scheme came to light when Respondent Donald Conn was arrested (and subsequently convicted) of selling beer without a license. After investigations by Central Distributors and law enforcement authorities revealed the extent of Respondents' illegal activities, Central Distributors filed suit against Respondents on October 6, 1989.

On February 28, 1991, the District Court issued an Order Granting Defendants' Motion for Dismissal and/or Summary Judgment. The District Court dismissed Central Distributors' Complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for failing to allege wire fraud with sufficient specificity.

Central Distributors timely filed a Motion for Reconsideration and/or for Leave to Amend Complaint. The District Court granted that Motion on September 30, 1991, and Central Distributors filed its First Amended Complaint on October 31, 1991.

On March 5, 1992, the District Court entered its Amended Order Granting Defendants' Motion for Summary Judgment and Dismissing State Law Claims, holding that Central Distributors had not presented evidence sufficient to prove its RICO claim. The District Court then dismissed Central Distributors' state law claims for lack of federal jurisdiction, without considering the merits of those claims.

On March 19, 1992, Central Distributors timely filed its Notice of Appeal to the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit").

On September 23, 1993, the Sixth Circuit affirmed the District Court by a vote of 2 to 1, with Senior Circuit Judge Wellford dissenting. The majority held that wire fraud was not committed by Respondents because no misrepresentation was made *directly* to Central Distributors by Respondents. The Court stated:

> [W]e believe the district court properly granted summary judgment in favor of the defendants on the RICO complaint. In our opinion, the fraud connected with mail or wire fraud must involve misrepresentations or omissions flowing from the defendant to the plaintiff. Although a general fraudulent scheme which incidentally affects a person may support other civil claims against the wrongdoer, the victim cannot assert a RICO claim absent evidence that the defendant made representations to the victim.
>
> 5 F.3d at 184.

Senior Circuit Judge Wellford dissented, stating:

> This is a close and difficult case, in my view. It involves one of the most complex statutes ever

> enacted by Congress, the Racketeer Influenced and Corrupt Organizations Act. The plaintiff presented a detailed and definitive statement of its claim that the defendants knowingly defrauded it by participating in an ongoing scheme to its claimed detriment by invading its established territory and transacting business illegally because the defendant was an unlicensed and "bootleg" dealer. There seems to me to be several potential genuine issues of material fact presented after some considerable discovery with this case.
>
> * * *
>
> I believe the district court should have considered whether claimed instances of mail or wire fraud at least indirectly were utilized, "in furtherance of the scheme" engaged in by defendants, claimed to be ongoing and damaging to the plaintiff.
>
> 5 F.3d at 184-185.

Because the Sixth Circuit's decision was based on different grounds than the District Court's decision, Central Distributors timely filed a Petition for Rehearing and/or Reconsideration with the Sixth Circuit. On January 25, 1994, the Sixth Circuit denied Central Distributors' Petition for Rehearing and/or Reconsideration, without explanation.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's Ruling, That In Order To Constitute Wire Fraud The Defendant Must Make A False Statement Directly To The Person Defrauded, Is Inconsistent With the Language Of The Wire Fraud Act And Is In Direct Conflict With The Decisions Of Other Circuits.

A. There is a direct conflict among the eight circuits that have decided this issue.

Nothing in the mail fraud (18 U.S.C. § 1341) or wire fraud (18 U.S.C. § 1343) statutes states that a telephone call or letter must be sent directly to the person defrauded. Those statutes merely require that the mails or interstate wire communications be used for the purpose of executing the scheme to defraud.[1]

Including the instant case, at least eight different Circuit Courts have addressed the question whether a defendant must make a false statement directly to the person defrauded to support a claim of wire fraud or mail fraud, or whether it is sufficient for the defendant to use the wires or mails to communicate with a third person in order to help carry out the scheme to defraud. This question has arisen in both criminal prosecutions for wire or mail fraud, and civil RICO cases in which wire or mail fraud is a predicate act relied upon by the plaintiff to establish the RICO claim. There is no consensus among

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[1] "The Courts have uniformly given the same construction to the language in both the mail and wire fraud statutes with the sole distinction between the crimes being the interstate communication device utilized by the alleged offender." *Van Dorn Co. v. Howington*, 623 F. Supp. 1548, 1555 (D.Oh. 1985).

the Circuits on this issue. To the contrary, the state of the law on this issue is quite confused. Four Circuits (the First, Eighth, Ninth and Tenth Circuits) have decided that a fraudulent statement does not have to be made directly to the person defrauded. Another three Circuits (the First, Fourth and Sixth Circuits) have decided that a fraudulent statement must be made directly to the plaintiff (the so-called "convergence" requirement). The Second Circuit is split on this issue.

1. Four Circuits Have Ruled That No Statement To The Person Defrauded Is Necessary.

The First, Eighth, Ninth and Tenth Circuits (plus a District Court in the Eleventh Circuit) have all held that the fraudulent statements do not need to be made directly to the person defrauded to constitute wire or mail fraud. It is sufficient if the mails or interstate wires are used to further the scheme to defraud.

In *United States v. International Term Papers, Inc.*, 477 F.2d 1277, 1279 (1st Cir. 1973), interpreting the mail fraud statute, the First Circuit stated:

> 18 U.S.C. § 1341 makes it a federal offense to use the mails in connection with a scheme to defraud. It is not necessary that the mailing be between the perpetrator and the victim; any mailing in connection with the scheme is enough.

In *United States v. Wise*, 553 F.2d 1173 (8th Cir. 1977), the Eighth Circuit upheld a wire fraud conviction when defendant used interstate telephone wires in connection with the fraudulent scheme, even though the alleged

telephone conversation was not directed to the victim of the fraudulent scheme. The Eighth Circuit stated:

> Wise also contends that the indictment fails to set forth a violation of 18 U.S.C. § 1343 because the alleged communication was not directed to a victim of the fraudulent scheme. This contention is clearly without merit. All that the statute requires is a scheme to defraud and an interstate telephone call made in furtherance of the scheme.
>
> 553 F.2d at 1174.

In *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393 (9th Cir. 1986), the Ninth Circuit considered a scheme to defraud the plaintiff which was strikingly similar to the scheme concocted by Respondents in the instant case to defraud Central Distributors.[2] The Ninth Circuit described the scheme in *Schreiber* as follows: "Schrieber [a wholesaler with the exclusive right to sell a particular brand of appliances in Southern California] alleged that appellees fraudulently obtained a shipment of Chambers' [the manufactuer whose products Schrieber had the exclusive right to sell] products which they sold in Schreiber's exclusive territory." 806 F.2d at 1399.

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[2] There is *dictum* in *United States v. Lew*, 875 F.2d 219 (9th Cir. 1989) that the Ninth Circuit favors the convergence theory, but the actual holding in *Lew* was that no one was defrauded of money or property. A lawyer was accused of defrauding his clients by submitted fraudulent documents to the Immigration and Naturalization Service, but the clients were found to be willing participants in this scheme.

The *Schreiber* decision clearly establishes the following legal doctrine: Where (a) a wholesaler has the exclusive right to market a particular brand of product within a geographic area, (b) the defendant designs a scheme to defraud the wholesaler by obtaining that brand of product elsewhere and then selling it within the wholesaler's exclusive territory, and (c) the defendant fraudulently obtains the product by making misrepresentations in an interstate telephone call to the manufacturer about where those products will really be sold by the defendant, wire fraud has occurred.

The only differences between the scheme to defraud the plaintiff in *Schreiber* and the scheme to defraud Central Distributors in this matter are (a) that the plaintiff in *Schreiber* had an exclusive territory to sell appliances, rather than beer; and (b) that the activities of the Respondents in the instant case continued for a substantial period of time (over six years), while the activities of the *Schreiber* defendants apparently continued for a more limited period of time. In other words, Central Distributors has an even stronger claim than the plaintiff in *Schreiber*.

In *United States v. Puckett*, 692 F.2d 663, 669 (10th Cir. 1982), *cert. denied*, 459 U.S. 1091, the Tenth Circuit stated that "the communication proscribed by the wire fraud statute need not be directed to the victim of the fraudulent scheme." The Tenth Circuit also took the same position five decades earlier, in *McNear v. United States*, 60 F.2d 861, 863 (10th Cir. 1932) ("[T]he statute does not require the mailing of a letter to the victim. It is enough if it is mailed to another, in furtherance of the scheme.")

A District Court in the Eleventh Circuit held that "the party injured by the acts of mail and wire fraud may state a [civil RICO] claim, even though the parties deceived . . . differ from the parties deprived of property as a result of the deception." The Court further stated that "nothing in the statute exempts from prosecution persons who achieve fraudulent objectives through the deception of third parties." *Texas Air Corporation v. Air Line Pilots Association*, 1989 United States Dist. LEXIS 11149; 113 Lab. Cas. (CCH) ¶11,776 (S.D.Fl. 1989).

2. Three Circuits Have Ruled That A Statement To The Person Defrauded Is Required.

Three Circuits have held that there must be a "convergence" between the person deceived by the wire fraud or mail fraud and the person defrauded of property.

In the instant case, the Sixth Circuit held that "the fraud connected with mail or wire fraud must involve misrepresentations or omissions flowing from the defendant to the plaintiff." *Central Distributors of Beer, Inc. v. Conn*, 5 F.3d at 184.

The First Circuit in *McEvoy Travel v. Heritage Travel, Inc.*, 904 F.2d 786 (1st Cir. 1990), also held that the fraudulent statements must be made directly to the victim.[3] A travel

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[3] Several of the Courts which have held that the person deceived must be the same as the person defrauded relied on *McNally v. United States*, 483 U.S. 350, 97 L.Ed.2d 292, 107 S. Ct. 2875 (1987). However, that was not the issue decided by this Court in *McNally*. In *McNally*, this Court held that, based on the statutory language and legislative history, the mail fraud statute applied only

agency could not bring a claim based on misrepresentations made by a competitor to a regulatory association.

The Fourth Circuit held, in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988), that a plaintiff must show detrimental reliance on misrepresentations in order to establish a RICO claim. While *Brandenburg* implied that no RICO claim could be based on the deception of a third party to defraud the plaintiff, the case did not actually involve communications to a third party. In two subsequent cases, district courts within that circuit have adopted the "convergence" theory. In *Mylan Laboratories, Inc. v. Akzo, N.Z., et al.*, 770 F. Supp. 1053 (D.Md. 1991). The Court concluded that:

> This Court feels that the better rule is to require that the person allegedly deceived by the misrepresentations be the person injured by the misrepresentations. This convergence of identity seems inherent in the idea of fraud as provided in the fraud statutes and defined by the Supreme Court in *McNally*. Moreover, the Fourth Circuit's holding in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988), suggests that this is the proper course. Accordingly, to the extent Mylan's claim of mail and wire fraud rests on the grounds that it was injured by defendants' false submissions to the FDA, the claim must fail.
>
> 770 F. Supp. at 1074.

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to schemes to defraud someone of money or property, and did not protect the "intangible right of the citizenry to good government." Furthermore, on November 18, 1988, Congress added 18 U.S.C. § 1346 to the mail fraud statute in order to overturn the effect of the *McNally* decision. Another reason to grant certiorari in this case is to address the effect of the *McNally* decision and the enactment of 18 U.S.C. § 1346 on the convergence theory.

Similarly, in *Lifschultz Fast Freight v. Consolidated Freightways*, 805 F. Supp. 1277 (D.S.C. 1992), the Court stated:

> This Court finds that the better reasoned rule is to require a convergence of the identity of the injured and the deceived. That is, the person allegedly injured by the misrepresentations must be the person allegedly deceived by the misrepresentations.
>
> 805 F. Supp. at 1294.

3. The Second Circuit Is Split On This Issue.

The Second Circuit has had conflicting decisions within the Circuit with respect to this issue of whether the fraudulent statements must be made to the victim.

In *United States v. Evans*, 844 F.2d 36, 39 (2d Cir. 1988), the Second Circuit, in a criminal case, stated in *dictum* that the Defendants could not be guilty of mail fraud unless the person deceived was also the person injured. In *Corcoran v. American Plan Corp.*, 886 F.2d 16 (2d Cir. 1989), the Second Circuit agreed with *Evans*, but did not actually decide the issue. In *United States v. Eisen*, 974 F.2d 246 (2d Cir. 1992), the Court discussed *Evans* and noted that there was a split of authority developing on the issue. *Id.* at 253, n.2. The *Eisen* Court did not decide whether "convergence" was required, because it held that the person injured in that case was also the person deceived.

Despite the *dicta* to the contrary in *Evans, Corcoran* and *Eisen*, two district courts in the Second Circuit have held that there need not be convergence between the person deceived and the person defrauded. In *Metromedia Co. v. Fugazy*, 753 F. Supp. 93 (S.D.N.Y. 1990), the Court stated: "Even if only a

third party, and not the plaintiff was deceived, the requirement of reliance is met if the plaintiff was injured by the fraud." 753 F. Supp. at 98.

Similarly, in *Shaw v. Rolex Watch USA, Inc.*, 726 F. Supp. 969 (S.D.N.Y. 1989), the Court held that "[A] plaintiff who is injured as a proximate result of fraud should be able to recover regardless of whether he or a third party is the one deceived." 726 F. Supp. at 973.

B. This Court has never directly addressed this issue.

This Court has never directly addressed the issue, but its prior decision in *Pereira v. United States*, 347 U.S. 1, 74 S. Ct. 358, 98 L.Ed.2d 435 (1954) suggests that this Court would hold that no direct communication to the defrauded party is necessary to establish wire fraud or mail fraud. In *Pereira*, the defendant defrauded his victim by courting and then marrying her for her money. The defendant was convicted of mail fraud because a check (the proceeds of the scheme to defraud) was mailed from the victim's bank in another state. All of the communications between the defendant and his victim were in person. This Court held that a person could be convicted of mail fraud even if he did not actually put the misleading document in the mail as long as the defendant's actions caused the document to be mailed. This Court concluded that even though defendant did not personally mail the check, he was guilty of mail fraud because the mail was used to execute the scheme to defraud. Nothing in this Court's decision in *Pereira* even suggested that the mails must be used to deceive the person defrauded, only that the mail be used as part of the scheme to defraud.

This Court should grant certiorari to resolve the conflict between the Circuits. This is particularly important because the conflict affects not only civil RICO cases, but also criminal prosecutions under the mail and wire fraud statutes. The lower courts and practitioners need guidance from this Court on whether mail fraud or wire fraud can be committed without direct communication to the person defrauded, and whether that conduct can be the predicate act for a civil RICO claim.

II. The Sixth Circuit's Ruling That The Elements Of Wire Fraud Differ Depending Upon Whether The Case Is A Criminal Prosecution Or A Civil Case Under the Racketeer Influenced And Corrupt Organizations Act Is In Conflict With A Prior Decision Of This Court.

Comparing its decision in the instant case with its decision in a prior criminal wire fraud case, the Sixth Circuit has essentially ruled that the elements of wire fraud differ depending upon whether the case is a criminal prosecution or a civil case under RICO in which wire fraud is alleged as a predicate act. This result is inconsistent with the prior decision of this Court in *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 87 L.Ed.2d 346, 105 S. Ct. 3275 (1985). In *Sedima*, this Court held that a prior criminal conviction is not necessary to establish a RICO predicate act. All that is required is that the act be *indictable* under one of the criminal statutes enumerated in 18 U.S.C. § 1961(1). Respondents' conduct is indictable in the Sixth Circuit.

In *United States v. Ames Sintering Co.*, 927 F.2d 232 (6th Cir. 1990), two of the three judges of the Sixth Circuit who heard the instant case below considered an appeal from a

criminal wire fraud conviction. The defendants in *Ames Sintering* conspired to rig bids on a contract with General Motors. The wire fraud convictions were based upon interstate telephone calls between suppliers of General Motors. No telephone calls were made directly to General Motors. The Sixth Circuit affirmed the wire fraud convictions because the defendants used interstate wire communications to further their scheme to defraud General Motors. The Sixth Circuit held that it was not necessary for the scheme to defraud to succeed for wire fraud to be committed. The Sixth Circuit did not hold, or even suggest, that an interstate telephone call to General Motors was necessary to support the wire fraud conviction.

Despite its prior ruling in *Ames Sintering*, the Sixth Circuit held that Central Distributors could not establish its RICO claim because there were no communications directly by the defendants to Central Distributors. The Sixth Circuit's decision in the instant case is simply inconsistent with this Court's decision in *Sedima*, because now the elements of wire fraud differ in the Sixth Circuit depending upon whether the case before the Court is a criminal prosecution or a civil RICO case.

CONCLUSION

For all these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: April 25, 1994

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 92-1453

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CENTRAL DISTRIBUTORS OF BEER, INC., *Plaintiff-Appellant,* *v.* DONALD CONN, an individual; GLORIA CONN, an individual; JOHN NATE BEVERAGE, INC., a Michigan Corporation; and JOHN NATE, JR., an individual, jointly and severally, *Defendants-Appellees.*	ON APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed September 23, 1993

Before: MARTIN and SUHRHEINRICH, Circuit Judges; and WELLFORD, Senior Circuit Judge.

MARTIN, Circuit Judge, delivered the opinion of the court, in which SUHRHEINRICH, Circuit Judge, joined. WELLFORD, Senior Circuit Judge (pp. 8-11), delivered a separate dissenting opinion.

BOYCE F. MARTIN, JR., Circuit Judge. Central Distributors of Beer, Inc. filed this action against Donald Conn, Gloria Conn, John Nate Beverage, Inc., and John Nate, Jr. for violation of Central Distributors' exclusive beer distribution rights with Anheuser-Busch, Inc. The complaint alleged four state law claims and one claim under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* The district court granted summary judgment in favor of the defendants on the RICO claim, finding that Central Distributors had failed to prove that the defendants had committed any predicate act to support the RICO claim. The district court then dismissed Central Distributors' state law claims for lack of subject matter jurisdiction. We affirm.

Central Distributors is a wholesaler of Anheuser-Busch brands of beer. Pursuant to the Michigan Liquor Control Act and the Wholesaler Equity Agreement between Central Distributors and Anheuser-Busch, Central Distributors has an exclusive territory that includes much of Wayne County, Michigan and part of Oakland County, Michigan. Under the exclusive territory agreement, Central Distributors had the exclusive distribution rights for Anheuser-Busch products to retailers in its territory. John Nate Beverage, Inc., another wholesaler of Anheuser-Busch products, had an exclusive distribution agreement with Anheuser-Busch in another part of Michigan. The Michigan Liquor Control Act also prohibited a distributor with an exclusive distribution territory from selling beer to retailers located outside its exclusive territory, and the Act permits the sale of beer only to licensed retailers.

According to Central Distributors' Complaint, Donald and Gloria Conn purchased large quantities of Anheuser-Busch products from Nate Beverage between 1983 and 1989. The Conns are not licensed retailers under the Michigan Liquor Control Act. The Conns allegedly transported the beer they purchased from Nate Beverage to their home, which was located in the Central Distributors exclusive distribution territory. The Conns then sold the beer to retailers and individuals in Central Distributors' exclusive territory. According to the complaint, Nate Beverage sold the beer to the Conns knowing that the Conns intended to sell and did sell the beer in Central Distributors' distribution territory. Central Distributors argues that the defendants engaged in this scheme to defraud Central Distributors by usurping sales that otherwise would have been made by Central Distributors or one of its retailers.

Central Distributors also alleged that Nate Beverage and the Conns engaged in an illegal scheme under the Michigan Bottle Bill to defraud Central Distributors. Under the Bottle Bill, a distributor must charge a deposit of ten cents for each bottle or can of beer that it sells to a retailer. The retailer then charges the deposit to the individual purchaser. When the purchaser returns the container, the retailer refunds the deposit and, in turn, seeks a refund from the distributor. According to Central Distributors, Nate Beverage sold empty beverage containers to the Conns for which Nate had already repaid the deposit to the retailer. The Conns then sold the empty containers to retailers within Central Distributors' territory, and the retailers returned the containers to Central

Distributors for a refund of a deposit that the retailer never paid to Central Distributors.

Central Distributors filed this action against the Conns, Nate Beverage, and John Nate, Jr., alleging four state law claims and one claim under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* In its RICO claim, Central Distributors alleges that the defendants committed mail and wire fraud by engaging in this scheme to sell beer to retailers within Central Distributors' exclusive territory and to obtain false refunds of deposits from Central Distributors. The defendants filed a motion to dismiss the action for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6), but the district court denied this motion and afforded Central Distributors an opportunity to amend its complaint.

After Central Distributors filed an amended complaint, the defendants again filed a motion to dismiss or for summary judgment with the district court. The district court granted summary judgment in favor of the defendants on Central Distributors' RICO claim, finding that Central Distributors had failed to present evidence to support its claim that mail or wire fraud were the predicate acts to support its RICO claim. Specifically, the court found (1) undisputed evidence that the Conns were not aware of the existence of Central Distributors before the commencement of this action; (2) no evidence that John Nate, Jr. sold beer to the Conns through Nate Beverage with any intent to defraud Central Distributors; and (3) no evidence that the Conns purchased from Nate any of the beer he distributed in Central Distributors' territory. Because the RICO claim had provided the only basis for

the district court's jurisdiction, the court dismissed Central Distributors' remaining state law claims. Central Distributors now appeals, and we affirm.

Under FED. R. CIV. P. 56(c), the district court may grant summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Id.* at 322-23. Our review of a district court's grant of summary judgment is *de novo*. *Brooks v. American Broadcasting Cos., Inc.*, 932 F.2d 495, 500 (6th Cir. 1991). Moreover, we view all evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A violation of 18 U.S.C. § 1962(c), the provision of RICO upon which Central Distributors relies to support its claim, consists of the following elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. V. Imrex Co.*, 473 U.S. 479, 496 (1985). " 'Racketeering activity' is defined in 18 U.S.C. § 1961(1)(B) as including any act 'indictable' under certain enumerated federal criminal statutes, including 18 U.S.C. § 1341, which makes mail fraud a criminal offense, and 18 U.S.C. § 1343, which makes wire fraud a crime." *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1399 (9th Cir. 1986). A civil RICO action does not require that there be a prior criminal conviction for

the conduct forming the predicate act; however, the conduct used to support a civil RICO action must be *indictable*. *Sedima*, 473 U.S. at 481-82. *See also* 18 U.S.C. § 1961(1). Thus, the plaintiff must prove each prong of the predicate offense, or "racketeering activity," to maintain a civil action under the RICO statute. *See Sedima*, 473 U.S. at 488-92. "In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the [predicate act] constituting the violation." *Id.* at 496.

The predicate acts upon which Central Distributors relies to establish racketeering activity by the defendants are mail fraud and wire fraud. To maintain its RICO action, Central Distributors must show that each element of mail fraud or wire fraud has been committed by the defendants. "To allege a violation of the mail fraud statute, it is necessary to show that (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud." *Schreiber*, 806 F.2d at 1399-1400. "Similarly, a wire fraud violation [sic] consists of (1) the formation of a scheme or artifice to defraud (2) use of the United States wires or causing a use of the United States wires in furtherance of the scheme; and (3) specific intent to deceive or defraud." *Id.* at 1400. Therefore, Central Distributors cannot maintain a civil RICO claim against these defendants absent evidence that the defendants made misrepresentations or omissions of material fact to Central Distributors and evidence that Central Distributors relied on those misrepresentations or omissions to its

detriment. *See Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984). *See also Blount Financial Svcs., Inc. v. Walter E. Heller & Co.*, 819 F.2d 151, 152 (6th Cir. 1987) (holding that the plaintiff must plead with particularity the false statements of fact made by the defendants to the plaintiffs and the facts showing that the plaintiff relied on those statements to its detriment); *Schreiber*, 806 F.2d at 1400 (noting that the plaintiff properly pleaded that the defendants had made misrepresentations to the plaintiff and that the plaintiff had detrimentally relied on those statements). Thus, the defendant must make a false statement or omission of fact *to the plaintiff* to support a claim of wire fraud or mail fraud as predicate act for a RICO claim.

Assuming that Central Distributors has met the requirement that it plead the acts of mail and wire fraud with particularity, *Blount Financial Svcs.*, 819 F.2d at 152, we believe the district court properly granted summary judgment in favor of the defendants on the RICO complaint. In our opinion, the fraud connected with mail or wire fraud must involve misrepresentations or omissions flowing from the defendant to the plaintiff. Although a general fraudulent scheme which incidentally affects a person may support other civil claims against the wrongdoer, the victim cannot assert a RICO claim absent evidence that the defendant made representations to the victim. Central Distributors has not produced a shred of evidence showing that any of the defendants made any false statements or omissions to Central Distributors or that Central Distributors relied on any statement or omission to its detriment. In fact, as the district court noted, evidence in the record demonstrates that the Conns were

not even aware of the existence of Central Distributors until after the commencement of this action. Moreover, Central Distributors never had direct contact with any of the defendants during the time that the Conns were allegedly selling beer in Central Distributors' exclusive territory. In our mind, Central Distributors has failed to point to any testimony or evidence that John Nate, Jr. sold beer through Nate Beverage to the Conns with any intent to defraud Central Distributors. Although the defendants may have committed other wrongs by this scheme, nothing in the record supports Central Distributors' claim that the defendants violated RICO in any way.

Accordingly, the judgment of the district court is affirmed.

WELLFORD, senior Circuit Judge, dissenting.

I. *SUMMARY JUDGMENT*

This is a close and difficult case, in my view. It involves one of the most complex statutes ever enacted by Congress, the Racketeer Influenced and Corrupt Organizations Act. The plaintiff presented a detailed and definitive statement of its claim that the defendants knowingly defrauded it by participating in an ongoing scheme to its claimed detriment by invading its established territory and transacting business illegally because the defendant was an unlicensed and "bootleg" dealer. There seems to me to be several potential genuine issues of material fact presented after some considerable discovery with this case.

First is the issue of whether the defendant Conn knew that he was illegally dealing in the plaintiff's territory. See, for example, the deposition testimony of Mr. Busatti, and consider reasonable inferences to be drawn from the circumstances established by the plaintiff (including Conn's false story that he was buying beer from an uncle from western Michigan).

Nate's unusual relationship with Conn and suspicious deliveries to Conn within the plaintiff's territory raises the issues of Nate's knowledge of the illegal transactions. Consider Conn's loading a U-Haul at Nate's place of business and the loading of a white truck there similar to the one making deliveries to Conn. *See* Hunsbergen's deposition testimony.

We review the grant of summary judgment *de novo* and view all the evidence and reasonable inferences to be drawn therefrom in a "light most favorable to the nonmoving party," as stated by the majority. I believe the district court should have considered whether claimed instances of mail or wire fraud at least indirectly were utilized "in furtherance of the scheme" engaged in by defendants, claimed to be ongoing and damaging to the plaintiff.. I concede the questionable showing here that the defendants made false representations to the plaintiffs and that the plaintiff relied on these misrepresentations to its detriment.

I believe remand is appropriate, however, so that the district court may hear argument on these close and difficult issues. The Plaintiff expressly requested a hearing and this was rejected by the district judge. I am persuaded that the plaintiff has demonstrated sufficient

likelihood of genuine contested issues of material fact that the district court improperly granted summary judgment.

II. *ORAL ARGUMENT*

While the *Sixth Circuit Federal Practice Manual* is generally aimed at practice before the courts of appeals, I believe its discussion of "The Importance of Oral Argument" is relevant with respect to dispositive motions pending before district courts in this circuit. In that Manual, the authors note that

> Oral argument is of great importance in the Sixth Circuit. Although different judges may give different weight to oral argument, all judges use oral argument to clarify issues and to inquire into the record.[7]

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[7] For an informative discussion of the views of various Sixth Circuit judges toward oral argument, see Rose, *Oral Argument in the Sixth Circuit*, 19 U. Tol. L. Rev. 229 (1988).

Sixth Circuit Federal Practice Manual at 112. An eminent academician stated the same thought well:

> Oral expression, especially in response to intelligent questioning, can convey ideals better than cold print can. It can supplement and clarify arguments that are not adequately set forth in briefs; it can rivet attention upon matters that a reader may have passed over too lightly . . . counsel heard in oral argument should be better satisfied that, by both written and oral presentations, he has had maximum opportunity to present his client's cause.

Robert A. Leflar, *Internal Operating Procedures of Appellate Courts* (American Bar Foundation 1976), at 32.

The importance of oral argument is emphasized by the fact that, in a majority of cases, the decision is ultimately reached in accordance with the impression that the judges have as they leave the bench. While it is quite true that the impression after oral argument derives from the reading of the briefs as well as from the argument, it is also true that the impression from reading the briefs may be changed or modified by the oral argument. Although the oral argument and brief complement each other, each serves a different purpose. The oral argument should be something in the nature of a tour de force designed to persuade the judges that fair play and precedent support the position of the advocate.

Concededly, Fed. R. Civ. P. 56 does not require an oral hearing, but Rule 56(c) seems to indicate that an actual "hearing" is (or should be) the usual course for dispositive summary judgment motions: "The motions shall be served at least 10 days before the time fixed for the hearing." Fed. R. Civ. P. 56(c).

In this particular case, I believe it was an abuse of discretion on the part of the district court not to conduct a hearing and permit oral

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The Federal Rules provide for a *hearing* with respect to certain definitive motions, which, like the present motion, may be dispositive of the case. *See* Fed. R. Civ. P. 12:

> FRCP 12(d) requires that a FRCP 12(b) motion for dismissal or a FRCP 12(c) motion for judgment on the pleadings be disposed of only after a hearing, which affords an opportunity to present legal arguments either orally, in writing, or both at the district court's discretion.

27 *Federal Procedure* § 62.375 (Lawyers Ed. 1984).

argument in this difficult and involved case. "Where the district court must assess the relative credibility of witnesses, the case is particularly inappropriate for summary judgment and requires a full hearing on the merits." *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 909 (6th Cir. 1982) ("The district court should be reluctant to dispose of a complex case on summary judgment. . . . " *Id.* at 908 n.5). RICO is a difficult statute fraught with problems in its interpretation. A corporate defendant that engages in fraudulent activities of a type described as "racketeering," and which is "the direct or indirect beneficiary of the pattern of racketeering activity" may be liable to a damaged and defrauded plaintiff. *Schreiber Distributing v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1398 (9th Cir. 1986). *See also Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985). *Compare*, however, *Blount Financial Services, Inc. v. Walter E. Heller Co.*, 819 F.2d 151 (6th Cir. 1987). I believe the district court should have heard argument on whether the defendants carried the "burden of *clearly establishing* the non-existence of any genuine issue of fact material to a judgment in his favor." *United States v. Articles of Device*, 527 F.2d 1008, 1011 (6th Cir. 1976) (emphasis added).

I would **REVERSE** and **REMAND** this case, under the circumstances, for the district court to consider further the summary judgment issues and to fix a time promptly to hear oral argument thereon.

APPENDIX B

Case No: 92-1453

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

CENTRAL DISTRIBUTORS OF BEER INCORPORATED, a Michigan corporation

Plaintiff – Appellant

v.

DONALD CONN; GLORIA CONN; JOHN NATE BEVERAGE, INCORPORATED, a Michigan Corporation; JOHN NATE, JR.

Defendants – Appellees

(Filed Jan. 25, 1994)

BEFORE: MARTIN and SUHRHEINRICH, Circuit Judges; WELLFORD, Senior Judge

Upon consideration of the petition for rehearing filed by the appellant; and the appellant's motion to stay the issuance of the mandate until 30 days after the petition is ruled upon,

It is **ORDERED** that the petition for rehearing and the motion to stay are **DENIED**.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green,
Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CENTRAL DISTRIBUTORS OF BEER, INC.,

Plaintiff,

vs.

DONALD CONN, et. al., jointly and severally,

Defendants.
_____/

C.A. No. 89-CV-60258-AA

HON. GEORGE La PLATA

AMENDED ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DISMISSING STATE LAW CLAIMS

I. INTRODUCTION

On October 6, 1989, Plaintiff, Central Distributors of Beer, Inc., commenced this action against four named Defendants including Donald and Gloria Conn, John Nate Beverage, Inc. and John Nate, Jr. Pursuant to this Court's order, Plaintiff was permitted to file a First Amended Complaint. In its five count First Amended Complaint, Plaintiff alleges four state law violations and one violation of the Racketeering Influenced and Corrupt and Organizations Act ("RICO"),[1] which serves as this Court's jurisdictional basis.

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[1] 18 U.S.C.A. §1961-1968, which is Title IX of the Organized Crime Control Act of 1970.

II. FACTS

Plaintiff, a Michigan corporation, is a state licensed wholesaler of beer. Pursuant to a Wholesalers Equity Agreement executed between Anheuser-Busch and Plaintiff, Plaintiff was awarded an exclusive territory in which to sell Anheuser-Busch products to retailers primarily in Wayne County, Michigan. Defendant John Nate Beverages, Inc. is a Michigan corporation that possesses an exclusive territory in which to sell Anheuser-Busch products to retailers consisting of Dowagiac, Michigan. The gravamen of Plaintiff's Complaint consists of allegations that (1) Donald Conn, an individual not licensed to distribute beer in Michigan, distributed beer to retailers within Plaintiff's exclusive jurisdiction; (2) the beer which Conn distributed was supplied by John Nate Beverages, Inc.; and (3) John Nate, Jr. was aware that the beer he supplied to Conn through John Nate Beverages, Inc. would be distributed in Plaintiff's exclusive territory. Because this Court's jurisdiction is predicated upon Count IV of the Complaint, the Court shall initially consider the merits of Plaintiff's RICO claim.

The United States Supreme Court crafted what has become the seminal case regarding RICO, *Sedima, S.P.R.L. v. Imrex Co.*[2] In that case the four elements which must be alleged to sustain a RICO claim under 18 U.S.C.A. §1962(c) were set forth: "(1) conduct; (2) of an enterprise; (3) through a pattern; and (4) of racketeering activity."[3]

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[2] 473 U.S. 479 (1985).

[3] *Id.* at 496.

"Racketeering activity" means "any act or threat involving" specified state-law crimes, any "act" indictable under specified federal statutes, and certain federal "offenses".[4] A "pattern" requires "at least two acts of racketeering activity" within a 10 year period.[5]

The substance of Plaintiff's RICO claim is contained in paragraphs 60 and 61 of its' First Amended Complaint. Each Defendant filed a motion seeking summary judgment predicated on numerous grounds. For simplicity sake, the Court shall consider the motions as joint.

Initially, Defendants contend that Plaintiff did not state the pattern of racketeering activity with specificity in violation of Federal Rule of Civil Procedure 9(b). Rule 9(b) provides in pertinent part that "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity". Fraud claims brought under the RICO Act are subject to the particularity and specificity requirements of Rule 9(b).[6] Pleading of fraud must provide enough specificity to allow the defendant "a reasonable opportunity to answer the complaint" and must give "adequate information" to allow the defendant to frame a response.[7] While not ruling on the issue, the Court will assume for purposes of this motion that the RICO claim is stated with sufficient specificity.

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[4] See, 18 U.S.C.A. §1961(1).

[5] See, 18 U.S.C.A. §1961(5).

[6] *Bender v. Southland Corp.*, 749 F.2d 1205 (6th Cir. 1984).

[7] See, *Ross v. A.H. Robins Co.*, 608 F.2d 545 (2nd Cir. 1979).

The predicate acts which Plaintiff relies upon to establish a pattern of racketeering are wire fraud and mail fraud. Under RICO mail fraud or wire fraud may constitute a racketeering act. To establish mail or wire fraud Plaintiff must prove three elements including that defendant knowingly and wilfully participated in the scheme of artifice to defraud, with knowledge of its fraudulent nature and with specific intent to defraud.[8] Defendants contend that Plaintiff has failed to come forth with any evidence to establish this element.

It is uncontroverted that Donald Conn was not aware of the existence of Central Distributor prior to the commencement of this law suit. Plaintiff's response to Defendants' motions does not direct the Court to any testimony or evidence which intimates that John Nate, Jr. sold beer to Conn through Nate Beverage with any intent to defraud Plaintiff. In fact, there is no evidence to suggest any beer illegally distributed by Conn in Plaintiff's territory was purchased from Nate. There is no question, if Plaintiff's allegations are true, that John Nate, Jr. and/or Nate Beverage, Inc. illegally sold beer to Conn. However, there is nothing on this record to support Plaintiff's RICO count predicated on wire or mail fraud.

III. CONCLUSION

Viewing the evidence in a light most favorable to Plaintiff, and for the reasons stated above, the Court concludes that Plaintiff has failed to come forth with any

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[8] See, 18 U.S.C.A. §1341.

evidence to support its RICO claim. Accordingly, Defendants' Motion for Summary Judgment is GRANTED. In light of this ruling, it is unnecessary to consider any further issues raised by Defendants. Because this Court's jurisdiction is based upon Count IV, the remaining state law claims shall be DISMISSED.

/s/ George La Plata
George La Plata
U. S. District Judge

March 5, 1992
Ann Arbor, MI

A TRUE COPY

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF
MICHIGAN

BY /s/ Illegible
DEPUTY CLERK